Supreme Court, U.S.
FILED
JUN 13 2003
OFFICE OF THE CLERK

No. 02-1663

IN THE

Supreme Court of the United States

DIANE MURRAY, Executrix of the Estate of JOHN MURRAY, Deceased, *et al.*,

Petitioners,

v.

CONNETQUOT CENTRAL SCHOOL DISTRICT OF ISLIP, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR CONNETQUOT RESPONDENTS

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Respondents, Connetquot Central School District of Islip, Dr. Joseph Laria, Dr. Anthony J. Pecorale, and John Maloney ("Connetquot defendants"), request the Petition for a Writ of Certiorari ("Pet.") filed by Diane Murray, individually and as nominated executrix of the estate of John Murray, seeking review of the decision of the United States Court of Appeals for the Second Circuit entered in this case on December 16, 2002 be denied.

COUNTER STATEMENT OF THE CASE

Petitioners seek recovery under 42 U.S.C. § 1983 for alleged violation of their right to equal protection and due process of law as guaranteed by the Fourteenth Amendment. Petitioners assert the Connetquot defendants violated their constitutional rights by deliberately or negligently introducing toxic substances into the working environment.

The action was commenced in Supreme Court, Suffolk County on or about August 3, 2000. The Respondents jointly removed the case from Supreme Court to the United States District Court, Eastern District of New York, on September 11, 2000.

After the close of pleadings under the District Court's Scheduling Order, all Respondents moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. By Memorandum Decision and Order of January 29, 2002 (Pet. App. at 8a), Judge Denis R. Hurley granted the Respondents' motions for judgment on the pleadings dismissing Petitioners' federal law claims and remanding the remaining State Law claims to Supreme Court, Suffolk County. On appeal, the United States Court of Appeals for the Second Circuit agreed with Judge Hurley's decision, finding the Petitioners had failed to allege valid due process or equal protection claims under Section 1983.

In a transparent attempt to grab the Court's attention, Petitioners now point to three federal court of appeals cases they claim conflict with the Second Circuit's holding below. In addition, Petitioners allege the District Court and Court of Appeals applied a heightened pleading standard. Further, Petitioners allude to allegations not appearing in the complaint to support their claims. (Pet. 6-7). A thorough analysis, however, will demonstrate that no actual conflict exists among the Circuit Courts and that no heightened pleading standard was employed. Rather, petitioners' complaint simply failed to allege a constitutional due process or equal protection violation under the standards enunciated by this Court.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW DOES NOT PRESENT A CONFLICT

The amended complaint fails to give "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). In reviewing the sufficiency of a complaint, "the issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Here, Petitioners simply neglected to allege the deprivation of a legally cognizable constitutional right, precluding any entitlement to offer evidence. (Pet. App. at 3a).

To state a viable cause of action under 42 U.S.C. § 1983, a plaintiff must allege that: (1) they were deprived of a right, privilege, or immunity secured by the federal Constitution or law of the United States; and (2) the deprivation was caused by a person while acting under the color of state law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The threshold issue is

whether plaintiffs' harm was caused by a constitutional violation. *See Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992). The first prong therefore necessarily requires an identification of the right, privilege, or immunity whose deprivation is alleged. *Id.* at 125.

In *Collins*, this Court concluded the legal standard for determining whether there has been a denial of substantive due process is whether the conduct is "arbitrary" or "conscience shocking" in a constitutional sense. 503 U.S. at 128. Considering allegations almost identical to those in the instant matter, the Court rejected Collins' two theories of recovery: "that the Federal Constitution imposes a duty on the city to provide its employees with minimal levels of safety and security in the workplace, or that the city's 'deliberate indifference' to Collins' safety was arbitrary action that must 'shock the conscience' of federal judges" *Id.* at 126. *Collins* involved alleged unsafe working conditions that caused the death of a municipal worker who entered a sewer without adequate ventilation. *Id.* at 117.

Those facts are significant for two reasons. First, until the decision in *Collins*, this Court had left open the question of what type of conduct would be sufficient to trigger the protections of the Due Process Clause with respect to people who are enjoying unrestricted liberty. *See Whitley v. Albers*, 475 U.S. 312, 327 (1986) and *Daniels v. Williams*, 474 U.S. 327, 334 n.3 (1986). This Court addressed for the first time the substantive due process rights of an individual enjoying unrestricted liberty. 503 U.S. at 123, 127.

Second, and equally important, is the fact the *Collins* decision involved a claim based upon an alleged creation of danger by state action (or inaction). *Id.* at 126. Thus, a claim for a deprivation of the substantive component of the Due Process

Clause by a person enjoying unrestricted liberty based upon a creation of danger theory should be governed, if at all, by whether the state action was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Sacremento v. Lewis*, 523 U.S. 833, 847 n.8 (1998).

Like the Petitioners here, the petitioner in *Collins* failed to adequately describe the constitutional right at stake, namely a willful violation of Collin's rights. *Collins*, 503 U.S. at 125. ("[S]he does not even allege that his supervisor instructed him to go into the sewer when the supervisor knew or should have known that there was a significant risk that he would be injured."). Similarly, Petitioners failed to identify any actions of the Connetquot defendants' that deprived them of a constitutional right. "[T]he 75-page amended complaint contains absolutely no facts to support [its] conclusory allegations." (Pet. App. at 17a).

As Judge Hurley noted, "The Plaintiffs' complaint, permeated by redundant verbiage and synonyms, does not describe the due process with any degree of specificity . . . the Plaintiffs do not specifically allege the specific rights they claim were denied to them without due process" (Pet. App. at 11a-12a). The District Court also found plaintiffs failed to allege that the District was ever aware of the environmental hazards at the bus garage at any time. (Pet. App. at 18a). The Second Circuit affirmed, noting "plaintiffs failed to state a § 1983 claim because they did not allege deprivation of a legally cognizable constitutional right." (Pet. App. at 3a).

Petitioners cite to three summary judgment cases is support of their argument. *Eddy v. Virgin Islands Water and Power Authority*, 256 F.3d 204 (3d Cir. 2001); *Upsher v. Grosse Pointe Public School System*, 285 F.3d 448 (6th Cir. 2002),

cert. denied, __ U.S. __, 123 S. Ct. 88 (2002); *Sherwood v. Oklahoma County*, 42 Fed. Appx. 353, 2002 WL 1472197 (10th Cir. 2002), *cert. dismissed*, __ U.S. __, 2003 WL 21121073 (2003). These cases are readily distinguishable from the instant matter, both procedurally and substantively. Rather, the issues in this matter have previously been decided by this Court in *Collins*, 503 U.S. 115 (1992).

Neither the summary judgment cases cited by petitioners nor the Second Circuit's decision here are in conflict with the holding in *Collins*. Plaintiff claimed a violation of his rights under Section 1983 as well as several tort-based claims in *Eddy v. Virgin Islands Water and Power Authority*, 256 F.3d 204 (3d Cir. 2001). Plaintiff alleged that the defendant and its employees knew that he would face a risk of almost certain injury if he performed the work on the live voltage power line. *See Eddy v. Virgin Islands Water and Power Authority*, 955 F. Supp. 468, 474 (D. V.I. 1997). Additionally, plaintiff alleged he was threatened with disciplinary action if he refused to perform the required work. *Id.* Defendants' motion for summary judgment on the basis of qualified immunity was denied by the District Court and subsequently appealed to the Court of Appeals.

In analyzing the case to determine whether the defense of qualified immunity applied, The Third Circuit distinguished that case from *Collins* by noting that Eddy asserted "the substantive due process right to be free from conduct by a governmental employer that shocks the conscience." *Eddy*, 256 F.3d at 211. In contrast, Collins did not allege that the city had any specific intent to harm her husband, or even that city officials knew there was significant risk that he would be injured. *Collins*, 503 U.S. at 125; *Eddy*, 256 F.3d at 212 ("[W]e understand *Collins* to mean that the allegations in that case did not rise to the conscience-shocking level. . . .") Eddy, however, alleged that defendant's

conduct shocked the conscience and, therefore, alleged a violation of a clearly established constitutional right. *Eddy*, 256 F.3d at 213.

Again, the District Court and, by its affirmance, the Court of Appeals, found Eddy had adequately pled a constitutional violation. ("[H]e does allege that they were virtually certain that he would suffer injury . . . The factual allegations presented by Mr. Eddy . . . are sufficient to shock the conscience of this Court.") *Eddy*, 955 F. Supp. at 475. In stark contrast, the Complaint herein makes no factual allegations at all. This deficiency is fatal to Petitioners' claims since it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

In *Upsher v. Grosse Pointe Public School System*, 285 F.3d 448 (6th Cir. 2002), *cert. denied*, __ U.S. __, 123 S. Ct. 88 (2002), plaintiffs filed a claim alleging, *inter alia*, civil rights violations under 42 U.S.C. § 1983 related to an asbestos issue at a public school. *Id.* at 449-50. Defendants were informed that underlying floor tiles containing asbestos might be disturbed by machines that remove old carpet from the floors. The school ordered its custodians to remove the carpet nevertheless, without providing dust-removing air vacuums, protective clothing or respirators. Although the Sixth Circuit held a "fair reading" of the complaint alleged a willful violation of the Due Process Clause, the evidentiary record did not suggest that defendants deliberately decided to inflict pain or bodily injury on the plaintiffs. *Upsher*, 285 F.3d at 453. "[P]laintiffs' evidence establishes, at best, a case sounding in negligence and not a constitutional tort under § 1983." *Id.* at 454.

The Circuit Court's examination of the complaint in *Upsher* indicated that a constitutional violation was adequately alleged. *Upsher*, 285 F.3d at 452 ("The plaintiffs allege that the defendants, in ordering the plaintiffs to remove the asbestos-containing material, caused injury. . . ."). Nevertheless, based on the lack of evidence suggesting a constitutional tort, the Sixth Circuit dismissed the Section 1983 action. In contrast, petitioners herein presented nothing other than conclusory allegations regarding the Connetquot defendants' actions. This deficiency in pleading any facts to support their claims properly led to dismissal by the District Court, and affirmance of that dismissal by the Second Circuit.

In *Sherwood v. Oklahoma County*, 42 Fed. Appx. 353, 2002 WL 1472197 (10th Cir. 2002), defendants were ordered by the local Health and Safety Department to shut down their vehicle painting operation, which was improperly ventilated. Defendants then directed plaintiff to paint the vehicles using hazardous paint in a make-shift paint booth, also without adequate equipment or ventilation. Furthermore, plaintiff was threatened with termination if he refused to complete the painting process. The Tenth Circuit considered the factual question of whether defendants' actions were sufficient to meet the "shock the contemporary conscience" standard applied to substantive due process claims. *Id.* at 355. The court held the facts pled presented a jury question as to defendants' actions ("[A] reasonable jury could find Defendants' behavior was egregious, outrageous and recklessly indifferent to the serious consequences imposed on Plaintiff."). *Sherwood*, 42 Fed. Appx. at 360.

Here, there are no analogous facts pled by petitioners. "[T]he 75-page amended complaint contains absolutely no facts to support [its] conclusory allegations." (Pet. App. at 17a).

Not only did plaintiffs fail to identify the constitutional right they claim to have been violated, they failed to plead any facts regarding the Connetquot defendants actions.

Like the complaint itself, the first two questions presented by Petitioner are unnecessarily verbose and conclusory. However, this Court has previously answered both these questions. As in *Collins*, a bald allegation of "deliberate indifference" in a municipal workplace safety case is insufficient to impart Section 1983 liability. To prevent dismissal of a workplace safety claim based on a constitutional violation, at a minimum a petitioner must describe the constitutional right at stake and the actions taken by the defendants to deprive him of that right. *Collins*, 503 U.S. at 125. Here, Petitioners failed to describe either.

To be actionable under the standard announced in *Collins*, the action taken by a municipality must be "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *See Sacremento v. Lewis*, 523 U.S. 833 (1998). The Third, Sixth and Tenth Circuits uniformly applied this standard in the cases noted above. Here, the Second Circuit had no occasion to reach the issues considered by its sister courts (*i.e.* whether defendants alleged actions "shock the conscience") because Petitioners' complaint failed to describe the constitutional right at stake and what actions were taken by the Respondents to deprive them of that right, as required under *Collins*.

II. THE COMPLAINT FAILED TO STATE VALID DUE PROCESS OR EQUAL PROTECTION CLAIMS

The issue to be determined here is whether Petitioners complied with the minimum requirements needed to properly plead a workplace safety claim based on a constitutional violation. Petitioners claim that Judge Hurley erred in granting

defendants' motions for judgment, arguing that the court misapplied the heightened scrutiny standard. However, Petitioners' argument is without merit since Petitioners failed to meet the minimum standard required by the Federal Rules of Civil Procedure and because the pleading standards were correctly applied by the District Court and Second Circuit.

Plaintiffs assert, in conclusory fashion, that Judge Hurley and the Court of Appeals applied a heightened pleading standard. Rule 8(a) of the Federal Rules of Civil Procedure requires "a short and plain statement of the claim showing that the pleader is entitled to relief." The Supreme Court has found that:

> [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

Conley v. Gibson, 355 U.S. 41, 47 (1957).

Petitioners cite to *Swierkiewicz v. Sorema*, 534 U.S. 506, 122 S. Ct. 992 (2002), in which the Supreme Court rejected the Second Circuit's heightened pleading standard in employment discrimination actions, finding the heightened standard conflicts with Federal Rule of Civil Procedure 8(a)(2). The Court held that an employment discrimination plaintiff need only satisfy the simple notice pleading requirements of the Federal Rules of Civil Procedure. *Swierkiewicz*, 534 U.S. at 515. The Court noted that employment discrimination complaints need not include facts establishing a prima facie case of discrimination under the standard announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), but must include "a short and plain

statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2); *Swierkiewicz*, 534 U.S. at 511.

This Court previously rejected the enhanced pleading standard in Section 1983 actions, such as the instant matter. *Leatherman v. Tarrant County Narcotics Intelligence Unit*, 507 U.S. 163, 168 (1993) ("We think that it is impossible to square the heightened pleading standard applied by the Fifth Circuit in this case with the liberal system of notice pleading set up by the Federal Rules"). The Fifth Circuit had expressly applied a heightened pleading standard to plaintiffs' claim in *Leatherman*. Nevertheless, the courts of appeals "require[ ] the pleader to disclose adequate information regarding the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it." 5 C. Wright & A. Miller, Federal Practice and Procedure § 1202, p. 73 (2d ed. 1990).

Even a complaint that complies with the form requirements of Rule 8(a) is not insulated from a motion to dismiss based upon its substance. *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1041 (7th Cir. 1999). Additionally, verbose complaints have been subject to dismissal. *Kuehl v. Federal Deposit Insurance Corp.*, 8 F.3d 905, 907 (1st Cir. 1993) ("Plaintiffs had proceeded to file a verbose and redundant complaint . . . the possible substance of the claim is hidden in prolixity"); *Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001) ("any allegations that are material are buried beneath innumerable pages of rambling irrelevancies"). Here, too, Judge Hurley noted the Amended Complaint was "permeated by redundant verbiage and synonyms," yet failed to describe the due process claims with the required specificity. (Pet. App. at 11a-12a).

Petitioners argue the courts below bar misapplied the heightened pleading standard that was rejected by the Supreme Court in *Swierkiewicz*. This argument fails, however, because Petitioner in the case at bar failed to meet minimum standards for pleading as dictated in Rule 8(a). *Swierkiewicz*, 534 U.S. at 513. Petitioners were not required "to plead more facts than [they] may ultimately need to prove to succeed on the merits . . .". *Swierkiewicz*, 534 U.S. at 512. Plaintiffs simply neglected to plead the essential elements of a cognizable claim.

The answer to the third questions presented by Petitioners must therefore be an emphatic "no." Petitioners have not been denied due process and equal protection by either the Second Circuit or District Court because a heightened pleading standard was not applied. Similarly, Petitioners' fourth question, which jumps to absurd conclusions regarding municipal immunity, must be answered in the negative.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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